ORIGINAL

83-6150

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JESSE JOSEPH TAFERO,

Petitioner,

versus

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to
The Supreme Court of Florida

PETITION FOR WRIT OF CERTIORARI

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Counsel of Record
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Attorneys for Petitioner

January 24, 1984

QUESTION PRESENTED

Whether Florida's procedural rule on post-conviction relief, which precludes a death penalty defendant from obtaining an evidentiary hearing on the truth of the state's key witness' recantation, denies due process?

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STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to
The Supreme Court of Florida

PETITION FOR WRIT OF CERTIORARI

The Petitioner Jesse Joseph Tafero respectfully prays that a writ of certiorari issue to review the judgment, opinion and order on rehearing of the Supreme Court of Florida entered on November 29, 1983. Tafero v. State, 440 So.2d 350 (Fla. 1983).

OPINIONS BELOW

The Supreme Court of Florida denied Tafero leave to file a petition for writ of error coram nobis on October 6, 1983. Two justices dissented. The court denied rehearing. Copies of the order denying leave, the dissents and the order denying rehearing are contained in the appendix. (A. 1-4).

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment, United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to

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be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Eighth Amendment, United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment, United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Tafero was convicted on two counts of first degree murder and sentenced to death on May 18, 1976.[1/] The Supreme Court of Florida affirmed his conviction and sentence. Tafero v. State, 403 So.2d 355 (Fla. 1981).[2/]

Facts Concerning Relief Sought

Tafero filed a motion for leave to file petition for writ of error coram nobis in the Supreme Court of Florida. He requested only that the Court grant him leave to obtain an evidentiary hearing in the trial court. The primary purpose of that hearing was to determine the truth of the sworn recantation of the State's key witness against him.

The motion for leave contained two aspects. First, Tafero relied on the newly discovered sworn testimony of Walter Norman

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1/ No death warrant has been signed yet.

2/ The trial court found certain aggravating factors: (1) the murders were committed while defendant was on parole and a fugitive; (2) defendant had a significant history of criminal activity involving violence, all arising out of a single incident; (3) the murders were committed to avoid arrest; (4) the murders were committed to hinder law enforcement; (5) the murders were heinous, atrocious and cruel; and (6) Tafero created a great risk of death to many persons. The Supreme Court found that the last two factors were not supported by the evidence. However the court found that a new sentencing proceeding was not necessary because the trial court had found no mitigating factors.

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Rhodes, Tafero's co-defendant and the only witness who testified at trial that Tafero shot anyone. Rhodes testified for the State in return for the State's agreement not to seek the death penalty in his case. But in September 1982, Rhodes spontaneously sent an affidavit to the state attorney for Broward County, which specifically recanted his trial testimony. Rhodes subsequently reaffirmed the contents of that affidavit in a lengthy and detailed sworn statement. He unequivocally accepted responsibility for the shootings for which Tafero stands sentenced to death. Rhodes, not Tafero, was the triggerman.

Second, Tafero's motion relied on sworn evidence that he did not commit certain offenses for which he was convicted in 1967. Those 1967 convictions were the primary aggravating factor which led to imposition of the death penalty.

The Supreme Court of Florida denied Tafero leave to file a petition for writ of error coram nobis on either ground. He could not even obtain an evidentiary hearing on the truth of the matters raised. Two justices dissented. Justice Boyd stated:

> I dissent and would grant leave to apply for a writ of error coram nobis. I believe that when a witness, under penalty of perjury, recants critical testimony given at the trial, there should be an evidentiary hearing. Such a recantation raises the question of whether an innocent person has been sentenced to prison or the electric chair on the basis of perjured testimony. Surely when a substantial question of such a miscarriage of justice has been raised, the state, society, and the courts should be sufficiently concerned to require further inquiry.

(A. 2). Justice Overton's dissent was also simple and direct.

> I would find that whenever the asserted recanted testimony was a critical feature of the trial there must be an evidentiary hearing.

(A. 3).

Underlying Facts

This incident began at a rest stop in Broward County where Tafero, Sonia Linder, their children and Walter Rhodes had pulled over to sleep. Early in the morning they were awakened by a state trooper looking into the car. He apparently noticed a gun between the seats, opened the front door and took the gun. The

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trooper then began questioning Rhodes, Tafero and Linder. The events which followed culminated in the shooting of the state trooper and a visiting Canadian officer.

Three primary witnesses testified at Tafero's trial concerning the shooting. Two of those witnesses were disinterested and independent. They were truck drivers who pulled into the rest area and parked about 150 feet behind the trooper's car. They watched almost the entire sequence of events. Each of them testified that the Canadian officer was holding Tafero up against the trooper's car with his arm pinned behind his back at the time the shots were fired. Tafero did not fire the shots which killed the officers.

The third witness was Rhodes. He testified that Linder fired some shots from the rear seat of the car. Tafero then ran over to her, took the gun and fired the remaining shots.

It is this trial testimony which Rhodes recanted in his affidavit and sworn statement. In the summer of 1982, Rhodes contacted the news media and gave a three-hour taped interview in which he described every aspect of the incident. He sent an affidavit to the Broward County state attorney in which he repudiated his trial testimony and admitted that he, not Tafero and Linder, had killed the officers. Rhodes then gave a full statement under oath to Tafero's counsel. He reiterated that he had shot the officers, Tafero did not shoot anyone and Tafero had no idea that Rhodes was going to shoot anyone.

Despite Rhodes' repeated recantation under oath, the Supreme Court of Florida refused to allow Tafero leave to file a petition for writ of error coram nobis and obtain an evidentiary hearing on the truth or falsity of Rhodes' statements. It applied the standard which requires that the new evidence "conclusively" would have prevented the conviction.

REASONS FOR GRANTING THE WRIT

Florida requires a defendant to demonstrate that newly discovered evidence conclusively would have prevented the entry of judgment before the defendant may obtain an evidentiary hearing

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on the truth of the evidence. This rule violates the sixth, eighth and fourteenth amendments to the United States constitution. The evidence as to which Tafero was denied a hearing would have demonstrated that he did not pull the trigger.[3/] And that evidence would also have demonstrated that Tafero did not commit the crimes for which he was convicted in 1967, the basis for the finding of a "significant history of prior criminal activity". If Tafero had no committed the 1967 crimes, then the evidence would have shown the mitigating factor of no significant history of prior criminal activity.

Florida requires that the appellate court which affirms a conviction grant permission for a defendant to present newly discovered evidence to the trial court. Hallman v. State, 371 So.2d 482 (Fla. 1979). The evidence must meet two basic requirements: (1) it must be newly discovered; and (2) it "conclusively would have prevented the entry of the judgment." 371 So.2d at 485. Application of the second requirement in death penalty cases leads to unreasonable and improperly harsh results. As pointed out by the dissenting justices in Hallman:

> A death case should be an exception to the "conclusiveness test." In my view, the rigid application of the "conclusiveness test" is not proper in cases where the death penalty has been imposed. As Mr. Justice Stephens said in writing for the plurality in Gardner v. Florida, 430 U.S. 349, 351, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), the death penalty is different from any other means of punishment, both in its severity and finality. I also believe our failure to consider these allegations on the merits at the sentencing phase will result in a weakening of our death penalty statute and could lead to a reversal of this clause under the principles expounded by the United States Supreme Court in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). The majority in Lockett stated

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3/ The jury here returned a general verdict which could have been based on premeditated murder or felony murder. This Court has held that a general verdict must be set aside where it rests on both constitutional and unconstitutional grounds. Stromberg v. California, 283 U.S. 359 (1931). Therefore where, as here, the death penalty could have been based on findings of either premeditated murder or felony murder, and it would be unconstitutional to base the death penalty on felony murder, Enmund v. Florida, 455 U.S. 1015 (1982), a new trial is required. Cf. Zant v. Stephens, 456 U.S. 410 (1983). This issue was not an appropriate ground for coram nobis relief.

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> that: "The need for treating each defendant in a capital case with that degree of respect due to uniqueness of the individual is far more important than a non-capital case is." 438 U.S. at 605, 98 S.Ct. at 2965, 57 L.Ed.2d at 990.
>
> In conclusion, the majority's mistake in this case is not allowing [the new evidence] to be considered on its merits in regard to the appropriateness of the death penalty in this cause.

371 So.2d at 487 (Overton, J., dissenting). Furthermore, there is no rational reason for applying this conclusiveness standard based solely on the time at which the evidence is discovered. Fla.R.Crim.P. 3.600(a)(3) permits a motion for new trial based on newly discovered evidence if that evidence "would probably have changed the verdict or finding of the court." But that motion must be filed within 10 days of the verdict. Fla.R.Crim.P. 3.590. See also Fed.R.Crim.P. 33. Where, as here, a defendant cannot control the time at which supportive evidence will appear, he becomes subject to the law's vagaries which impose the burden on him of conclusively demonstrating something which he otherwise would not have to demonstrate.[4/]

Further, the Florida courts appear to interpret the conclusiveness test arbitrarily. Just before the Florida Supreme Court denied Tafero's motion for leave to file a coram nobis petition, the court issued its opinion in another death penalty case. Brown v. State, 439 So.2d 872 (Fla. 1983). In Brown, the Florida Supreme Court previously had remanded for an evidentiary hearing when the key state witness filed an affidavit recanting his trial testimony.[5/] The following appears on the face of the opinion:

> The first time Floyd recanted, Brown's counsel secured a post-trial affidavit from him stating that his trial testimony was false and that it was given in return for a prosecutori-

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4/ Apparently the only time the Supreme Court of Florida has found that a defendant met the conclusiveness test was where the prosecuting attorney admitted that the newly discovered evidence showed the defendant was not guilty and had a complete alibi. Ex parte Welles, 53 So.2d 708 (Fla. 1951).

5/ The fact that the trial court subsequently denied the motion and found that the recantation was not believeable is not relevant to the threshold question of whether an evidentiary hearing should be granted.

> al offer of favorable consideration. This Court granted Brown's motion to remand for an evidentiary hearing.

Id.

Other Florida courts grant evidentiary hearings where newly discovered evidence relates to the truth of the State's evidnece or shows that another confessed to committing the crime for which the defendant was convicted. E.g., Walden v. State, 310 So.2d 426 (Fla. 3d DCA 1975)(defendant granted evidentiary hearing on newly discovered evidence claim that another person confessed to crime for which defendant convicted; court found confession not believeable); Kellerman v. State, 287 So.2d 702 (Fla. 3d DCA 1973)(evidentiary hearing required where newly discovered evidence showed that state witnesses/codefendants had committed an unrelated crime at the same time they testified they participated in crime for which defendant was found guilty); Fast v. State, 221 So.2d 203 (Fla. 3d DCA 1969)(defendant granted evidentiary hearing on newly discovered evidence claim that another person confessed to crime for which defendant convicted; court found confession not believeable).

This Court has recently held that the sentencing authority must consider in mitigation any aspect of defendant's character and any of the circumstances of the offense. The sentencer cannot refuse to consider mitigating evidence as a matter of law. Eddings v. Oklahoma, 455 U.S. 104 (1982). See also Lockett v. Ohio, 438 U.S. 586 (1978):

> [A] statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

Lockett, supra, 438 U.S. at 605.

Similarly, this Court has held that a state procedural rule which precludes the sentencing authority in a death case from considering relevant and reliable evidence violates the sixth,

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eighth and fourteenth amendments. Green v. Georgia, 442 U.S. 95 (1979). In Green, defendant sought to prove during the sentencing trial that he was not present when the victim was killed. He attempted to introduce the testimony of a witness who had testified for the state at the codefendant's trial. The witness would have testified that the codefendant admitted to him that he had shot the victim after sending defendant out on an errand. The court refused to allow this testimony in evidence on the ground that it was hearsay. This Court held that the exclusion of this testimony was error.

> Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial . . . and substantial reasons existed to assume its reliability.

442 U.S. at 97.

Despite the holdings in Eddings and Green, which so strongly highlight this Court's concern with full consideration of factors which mitigate against imposition of the death penalty, the coram nobis conclusiveness test prevents consideration of mitigating evidence which is critical and relevant to imposition of the death penalty. It improperly precludes consideration of mitigating evidence. It permits an execution where the State's only witness swears that he, not the defendant, pulled the trigger. It permits an execution where there is sworn testimony that a third person, not the defendant, committed the prior crimes on which the sentencing judge relied as a key aggravating factor.

The proferred evidence from Rhodes would demonstrate that Tafero did not pull the trigger. That alone should preclude entry of the death sentence. Enmund v. Florida, supra. The remaining evidence would show that Tafero did not commit the crimes of which he was convicted in 1967. Therefore the trial court should not have found the aggravating factor of a significant history of prior criminal activity. Rather, Tafero would have no significant history of prior criminal activity in the absence of

the 1967 convictions. This is a mitigating factor.

A defendant should not be precluded from obtaining an evidentiary hearing concerning the recantation of the State's key witness because that defendant might not "conclusively" demonstrate that the judgment would be different. Courts dealing with the death penalty cannot and should not impose such an unmeetable burden and thereby treat the defendant's life so lightly. The application of the conclusiveness test to newly discovered evidence in a death penalty case is improper.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment, opinion and order on rehearing of the Supreme Court of Florida.

Respectfully submitted,

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Attorneys for Petitioner

By: _____
MARC COOPER

By: _____
SHARON L. WOLFE

January 24, 1983

INDEX TO APPENDIX

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Supreme Court of Florida

THURSDAY, OCTOBER 6, 1983

JESSE JOSEPH TAFERO,
Petitioner,
vs. CASE NO. 62,847
STATE OF FLORIDA,
Respondent.

On consideration of the Motion for Leave to File Petition for Writ of Error Coram Nobis, it is ordered by the Court that said motion be and the same is hereby denied.

ALDERMAN, C.J., ADKINS, McDONALD and EHRLICH, JJ., Concur
BOYD, J., Dissents with an opinion
OVERTON, J., Dissents with an opinion, in which BOYD, J., Concurs

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

JB

cc: Elizabeth J. Du Fresne, Esquire
of Du Fresne & Bradley, P.A.
Miami, Florida

Marc Cooper, Esquire
of Greene & Cooper, P.A.
Miami, Florida

Attorneys for Petitioner

Joy B. Shearer, Esquire
Assistant Attorney General
West Palm Beach, Florida

Attorney for Respondent

BOYD, J., dissenting.

I dissent and would grant leave to apply for a writ of error coram nobis. I believe that when a witness, under penalty of perjury, recants critical testimony given at the trial, there should be an evidentiary hearing. Such a recantation raises the question of whether an innocent person has been sentenced to prison or the electric chair on the basis of perjured testimony. Surely when a substantial question of such a miscarriage of justice has been raised, the state, society, and the courts should be sufficiently concerned to require further inquiry.

Overton, J., dissenting.

I dissent. I would find that whenever the asserted recanted testimony was a critical feature of the trial there must be an evidentiary hearing.

BOYD, J., Concurs

IN THE SUPREME COURT OF FLORIDA

TUESDAY, NOVEMBER 29, 1983

JESSE JOSEPH TAFERO,	**	
Petitioner,	**	
vs.	**	CASE NO. 62,847
STATE OF FLORIDA,	**	
Respondent.	**	

On consideration of the motion for rehearing filed by attorneys for petitioner, and response thereto,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: Debbie Causseaux
Deputy Clerk

cc: Elizabeth J. DuFresne, Esquire
Marc Cooper, Esquire
of Greene & Cooper
Bruce M. Lee, Esquire

NO. 83-6150

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ORIGINAL

JESSE JOSEPH TAFERO,

Petitioner,

versus

STATE OF FLORIDA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner Jesse Joseph Tafero requests leave of this Court to proceed in forma pauperis on his petition for writ of certiorari pursuant to Sup.Ct.R. 46 and states:

1. Tafero is on death row. This petition seeks review of the Supreme Court of Florida's denial of Tafero's motion for leave to file a petition for writ of error coram nobis.

2. Tafero had court appointed counsel at his trial. He was represented by the Public Defender, West Palm Beach, Florida on direct appeal to the Supreme Court of Florida. The Supreme Court of Florida permitted him to proceed in forma pauperis on his coram nobis motion.

3. Attached to this motion is an affidavit which sets out the facts in support of this motion.

WHEREFORE Petitioner Jesse Joseph Tafero requests leave of this Court to proceed in forma pauperis.

Respectfully submitted,

MARC COOPER, ESQ.
Counsel of Record
SHARON L. WOLFE, ESQ.
Suite 500, Roberts Building
28 West Flagler Street
Miami, Florida 33130
(305)371-1597

Attorneys for Petitioner

By: _____
MARC COOPER

NO.

IN THE SUPREME COURT OF THE UNITED STATES

JESSE JOSEPH TAFERO,

Petitioner,

v.

STATE OF FLORIDA,

_____/

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

I, JESSE JOSEPH TAFERO, being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed on petition for writ of certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting these proceedings are true.

1. I am not presently employed. I was last employed on 1974 and received a salary of $ 400 per month.

2. Within the past 12 months I have not received any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source.

3. I do not own any cash or checking or savings account.

4. I do not own any real estate, stocks, bonds, notes, automobiles, or other valuable property.

5. No one is presently dependent on me for support.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

JESSE JOSEPH LAFERO

SWORN TO AND SUBSCRIBED before me this 12 day of January, 1984.

Notary Public, State of Florida at Large

My commission expires: NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Aug. 23, 1987